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In The Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1122

JACKSONVILLE NEWSPAPER PRINTING PRESSMEN AND ASSISTANTS' UNION NO. 57,

Petitioner,

v.

FLORIDA PUBLISHING COMPANY,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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March, 1973.

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INTRODUCTION

Petitioner, on February 13, 1973, filed a Petition for a Writ of Certiorari to review a decision and judgment of the United States Court of Appeals for the Fifth Circuit, reported at 468 F.2d. 824. (Opinion dated October 26, 1972 – rehearing denied November 15, 1972.) Petition was received by Respondent on February 15, 1973. The Court of Appeals had affirmed a decision of the United States District Court for the Middle District of Florida, reported at 340 F.Supp. 993.

Respondent files this brief in opposition to the granting of the writ. It is necessary to restate the Question Presented, in accordance with Supreme Court Rule 40(d)(2).

QUESTION PRESENTED FOR REVIEW

When the parties for 17 years have had a written contract expressly providing for a four-man board of arbitration on all questions or differences (which board is set up and available) the courts may not interfere to rewrite the contract and provide for a different kind of arbitration.

There is no question here of such a nature as to justify certiorari to override the final appellate decision of the Court of Appeals. There is no conflict or departure from settled principles of law and decisions of the courts. (Supreme Court Rule 19.)

The Fifth Circuit's decision to defer to arbitration a dispute expressly embraced within the scope of the grievance-arbitration clause of the collective bargaining contract is in accord with long established national labor policy, and the repeated holdings of this Court.

STATEMENT OF THE CASE

Petitioner (sometimes hereinafter referred to as the Union or plaintiff) since 1941 has had labor contracts with the Respondent (sometimes hereinafter referred to as Publishing Company or defendant). Over the intervening 32 years, their relations have been pleasant and cordial and there have been no difficulties in adjusting any differences.

From 1941 to 1956, the parties had written contracts call-

ing for a fifth or outside arbitrator – the very thing the Union now wants put back into the contract. (T. Appendix 88, 89)[1]. But, some 17 years ago, this provision for an outside arbitrator was taken out of the contract by mutual agreement. The record does not disclose that it had ever been used or that an outside arbitrator was ever necessary. Subsequent to 1956, the Union negotiated to get it back in the contract, but this outside arbitrator provision was never restored. [See affidavits of all negotiators – in particular, Smith (T. Appendix 130) and Reid (T. Appendix 89)]. The present contract calls for arbitration before a four-man board (Joint Standing Committee – Petition, p. 5).

Section 16 of the parties' contract expressly provides that – 'to this committee (Bipartite Joint Standing Committee) shall be referred *all questions* which may arise *as to the construction to be placed upon any of the clauses of this Agreement or any alleged violations thereof*, which cannot be settled otherwise.' (T. Appendix 22-23, Petition p. 5)

Alleging that "no arbitration board has yet been formed" (T. Appendix 165), the Union went to court. It asked the *court* to amend the written contract to provide for a fifth arbitrator, to set up such *new* board, and to require arbitration before such new board (T. Appendix 3, 43, 149, 156).

Thus the Union is trying to get the court to rewrite the written contract attached to the complaint. On that point, the facts were so clear the Publishing Company repeatedly sought a summary judgment requiring arbitration before the

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Note 1: We refer to the Transcript or Printed Appendix sent up by the Fifth Circuit as T. Appendix.

four-man board contracted for and already set up by the parties (T. Appendix 83).[2]

The trial court felt it was not necessary to get to that point. After giving the Union every chance to amend, it dismissed the Union's *third* amended complaint on the ground that the Union had not stated any claim for judicial relief (340 Fed. Supp. 993, M.D. Fla. 1972).

The Trial court held that "no relief can be granted under any construction of the contract urged by the plaintiff" (T. Appendix 160-165). The Petition copies the Order at pages 6a to 10a.

Fifth Circuit Opinion

On appeal, the Fifth Circuit affirmed, but on a somewhat different basis. It held (C.A. Fla. 1972, 468 F.2d. 824, pages 4a and 5a of Petition):

> "It thus appears that the question determined by the district court was *saved by agreement of the parties for the Joint Standing Committee.* And this is also the reason why appellant union was entitled to no relief. In *Local Union No. 787, International Union of Electrical Radio and Machine Workers, AFL-CIO v. Collins Radio Company,* 5 Cir., 1963, 317 F.2d. 214, we said: *'That which the parties have committed to the arbiter is for the arbiter alone – not the Court.'* 317 F.2d. at 220. This is the rationale of *International Union of Operating Engineers Local 15, AFL-CIO v. Flair*

Note 2: As shown in our motions and renewed motions for summary judgment, on the undisputed facts the Publishing Company was entitled to judgment. (T. Appendix 33, et seq.; 83, et seq.; 151, et seq.; 158, et seq.).

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Builders, Inc., 1972, ... U.S. ....., 92 S.Ct. ....., 32 L.Ed.2d. 248. *The only questions for the court are whether the parties have agreed to arbitration, and the scope of the arbitration clause. Here the parties have so agreed and the scope of the arbitration clause embraces the questions presented.*

The question involving the bar of the failure to form the arbitration board in thirty days (Agreement, Section I(2)), and whether there was a modification of the agreement so as to provide a disinterested person as a fifth arbitrator are for the Joint Standing Committee under the agreement and not for the court." (Italics here and elsewhere added by us unless otherwise indicated.)

The parties here have had for 17 years a contract which in so many words provides for all disputes to go to a four-man board of arbitrators (Joint Standing Committee – T. Appendix 23 – Petition, pp. 5 and 8a), which is already set up (T. Appendix 136). The Publishing Company now is, and always has been, perfectly willing for all unresolved disputes to go before that board (T. Appendix 84, 130, 136). For 32 years, the parties have been able to peacefully adjust their differences.

Joint Arbitration Boards Not Unusual

As pointed out by witness Reid *and not disputed by any one*, it is not at all unusual to have a four-man joint board (T. Appendix 92).

That a contract providing for an equal number of management and union representatives, without an outside arbitra-

tor, is not unusual or unlawful, is indicated by the following cases, among others:

Roadway Express, Inc., 54 LRRM 1419, 145 NLRB No. 51 (1963). (A Board decision containing comments on bipartite grievance committees.)

Denver-Chicago Trucking Co., 48 LRRM 1524, 132 NLRB No. 123 (1961). (Labor Board recognizes the sufficiency of a grievance procedure utilizing a committee with an equal number of management and union representatives.)

Mechanical Contractors Assn. and Local Union 269 (Case No. 2-CA-12413, June 25, 1972) NLRB-TXD-419-72, BNA Daily Labor Report No. 124-6, June 26, 1972.

IUE v. Radio Corp. of America, 74 LRRM 2883, (S.D. N.Y. 1970). (Contains a good discussion and some citations on Section 203(d) of the National Labor Relations Act (29 USC 173 (d)).

New Teamsters' National Freight Agreement covering over-the-road and local cartage employees, where the national grievance procedure (Article 8, pages 41-45) provides for a bipartite grievance committee (BNA Collective Bargaining Negotiations and Contracts, Section 30:10 (1970)).

The practice of utilizing an arbitration board consisting of equal representation between labor and management is premised upon a number of factors, as shown by the above cases. One of them is the logical assumption that arbitrators *familiar* with the plant operation are in a *better* position to resolve disputes, than is an *outsider* who is a stranger to the dispute and to the history of the plant operation.

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In essence, the Union seeks to have the Court compel the parties not merely to arbitrate (which both sides are willing to do) but rather to arbitrate in a manner specified by the Union. This flies in the face of the express written agreement of the parties.

REASONS FOR NOT GRANTING THE WRIT

Asserted "Novel Question" Not Sufficient

We had not understood that just because a party was dissatisfied with the terms of a formal written contract, or the final appellate decision of a Court of Appeals, that entitled him to certiorari review by this Court. Such a result is diametrically opposed to Supreme Court Rule 19 which specifically limits certiorari.

As stated by Mr. Chief Justice Vinson (Stern and Gressman, Supreme Court Practice, Second Edition, page 107):

> "The Supreme Court is not, and never has been, primarily concerned with the *correction of errors* in lower court decisions. In almost all cases within the Court's appellate jurisdiction, the petitioner *has already received one appellate review of his case.* The debates in the Constitutional Convention make clear that the purpose of the establishment of one supreme national tribunal was, in the words of John Rutledge of South Carolina, 'to secure the national rights & uniformity of Judgmts.' The function of the Supreme Court is, therefore, to resolve conflicts of opinion on federal questions that have arisen among lower courts, to pass upon questions of wide import under the Constitution, laws, and treaties of the United States, and to exercise

> supervisory power over lower federal courts. If we took every case in which an interesting legal question is raised, or our *prima facie* impression is that the decision below is erroneous, we could not fulfill the Constitutional and statutory responsibilities placed upon the Court."

Or, as Mr. Chief Justice Taft expressed it in *Magnum v. Coty* (1923) 262 U.S. 159, 163:

> "The jurisdiction (of the Supreme Court to review cases by way of certiorari) was not conferred upon this Court merely to give the defeated party in the Court of Appeals another hearing. Our experience shows that eighty per cent of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ."

Petitioner (at page 2) says the jurisdiction of this Court is invoked under 28 USC 2101(c). That section merely fixes the *time* (90 days) within which to seek certiorari. It certainly *does not confer jurisdiction.*

In its Question, Petitioner sets up a hypothetical situation which is not applicable here. Here, the parties (as held below), by formal written contract, agreed on the proper composition of the board of arbitration, and that board is set up and available.

In its "Reasons for Granting the Writ" (Petition, p. 6), Petitioner asserts only a "novel question." It does not assert any conflict or unsettled question or departure as contemplated by Rule 19. It merely tries to get review because of a "novel question" (this despite a firm written contract and a final appellate decision).

Just what novel question of national scope is there here to justify certiorari? There is none. This Court has repeatedly held, just as the Fifth Circuit did below, that that which the parties have committed to arbitration is for the arbiter – not the Court.

Section 203(d) of Labor-Management Relations Act

We are in accord with Petitioner's "starting point for the Union's argument" (Petition, p. 2), i.e., Section 203(d) of the Act:

> "Final Adjustment *by a method agreed on by the parties* is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement *****."

But the Parties Make the Contract and the Method, Not the Courts

It is Hornbook law, as stated at 17 Am.Jur.2d., Contracts, Section 242, pages 627, et seq.:

> "It is a fundamental principle that a court may not make a new contract for the parties or rewrite their contract under the guise of construction. In other words, the interpretation or construction of a contract does *not* include its *modification* or the creation of a new or different one."

Cf. *Chevron Oil v. N.L.R.B.* (CA-5, 1971) 442 F.2d 1067, 1073, 1074; *Local 464 v. Hershey* (CA-9, 1970) 433 F.2d. 926; *N.L.R.B. v. Gulf Atlantic* (CA-5, 1961) 291 F.2d. 475, 478; *In Re Pacific Neo-Gravure* (1968) 51 L.A. 14, 25; and *U.S. Bulk Carriers v. Arguellas* (1971) 400 U.S. 351, 361.

This Court has repeatedly held that *"arbitration is a matter of contract." United Steelworkers v. Warrior* (1960) 363 U.S. 574, 582; *Atkinson v. Sinclair* (1962) 370 U.S. 238, 241; *Wiley v. Livingston* (1964) 376 U.S. 543, 547.

No one disputes that for many years the parties have agreed (by formal written contracts) on a joint four-man board. They have gotten along well and amicably. Now, the Union has decided to try to get the Court to rewrite its contract for it to provide a different method. Four-man boards are common and rather universally accepted in labor contracts, as set out at page 5. Here, the Union agreed 17 years ago to cut out the fifth outside man. It is a question for the parties, *not* for the courts, as to *rewriting* the contract to reinstate the fifth man.

The Courts May Not Take Over as Arbiter

Finally and perhaps most important, as this Court recently held in *International Union v. Flair* (1972) 406 U.S. 487, 32 L.Ed.2d. 248, and as stated by the court below:

> "That which the parties have committed to the arbiter is for the arbiter alone – not the Court." (Petition, p. 4a, 468 F.2d. 824).

The four-man arbitration board is and has been set up and available to act as arbiter.

For years, many employers and unions have agreed on and used joint arbitration boards – like the four-man board here.

This very Union for 17 years has had such an agreement. This has not suddenly become a "novel question" which justifies a complete departure from settled law, and the repeated decisions of this Court.

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The Union and the Publishing Company have been able since 1941 to get along peaceably, and settle their disputes without bringing in an outside arbitrator. It is unseemly to assert at this late date that the Joint Arbitration Board cannot adjust any differences. There is not a line in the record to support such an assertion. All the past history is to the contrary. The Union here just chose to go to court to try to get the contract rewritten rather than give the Joint Arbitration Board a chance to operate. The Union should present its dispute to the Board.

In essence, the Union seeks to have the Court compel the parties not merely to arbitrate (which both sides are willing to do), but rather to arbitrate as specified by the Union, directly contrary to the express written agreement of the parties. The Union's position flies in the face of a long line of decisions of this Court beginning with *United Steelworkers v. Warrior, supra,* and as late as *International Union v. Flair* (1972) *supra.* In *United Steelworkers v. Warrior, supra,* this Court enunciated the national labor policy favoring deference to arbitration where a dispute arising under the contract is "arguably arbitrable":

> "Apart from matters that the parties specifically exclude, all of the questions on which the parties disagree must therefore come within the scope of the grievance and arbitration provisions of the collective bargaining agreement. The grievance procedure is, in other words, a part of the continuous collective bargaining process. It, rather than the strike, is the terminal point of the disagreement. (363 U.S. at 581)
>
> . . . .
>
> "An order to arbitrate the particular grievance should not be denied unless it may be said with positive as-

> surance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." (363 U.S. at 582).

This case involves nothing more than "a dispute over the meaning and application of the collective bargaining Agreement." The parties here have committed all such disputes to the Joint Standing Committee – not to the Courts. See *International Union v. Flair, supra; Wiley v. Livingston, supra,* and *Collyer Insulated Wire* (1971) 192 N.L.R.B. 150.

CONCLUSION

Admittedly, and as found by both courts below, the parties had a formal written contract calling for a four-man arbitration board.

The language of the contract as set up in the Petition on page 5 provides that should "any question or difference arise between the parties ----, it shall immediately be referred in writing" to the joint four-man board. This expressly includes questions of "construction."

The parties have agreed on an arbitration set-up for their differences here involved. There is now set up the board agreed on by the parties for such arbitration.

The decision of the Fifth Circuit below is in accord with long standing national labor policy – that which the parties have committed to the arbitrator is for the arbitrator alone – not the Court. No basis for certiorari jurisdiction has been established. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY I have this 2nd day of March, 1973, mailed copies of the foregoing Brief of Respondent to Patrick M. Scanlon, Esquire, attorney for the Petitioner, at 600 Rhodes-Haverty Building, Atlanta, Georgia 30303.

HAROLD B. WAHL